HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 364 OF 2005
IN
WRIT PETITION NO. 1097 OF 2004

M/s.Hindoostan Spg.& Wvg.
Mills Ltd., Mumbai. ... Appellant.

Vs.

1. Hindustan Crown Mills
   Siddhivinayak Kamgar
   Karmachari Sangharsha
   Sanghatana.

2. Hindustan Mills Process
   House Siddhivinayak Kamgar
   Sangharsha Sanghatana.

3. Rastriya Mill Mazdoor Sangh.

4. Commissioner of Labour.

5. State of Maharashtra. ... Respondents.

WITH
APPEAL NO. 441 OF 2005
IN
WRIT PETITION NO. 1097 OF 2004

1. Hindoostan Crown Mills
   Siddhivinayak Kamgar
   Karmachari Sangharsha
   Sanghatana.

2. Hindustan Mills Process
   House Siddhivinayak Kamgar
   Sangharsha Sanghatana. ... Appellant.

Vs.

1. M/s.The Hindoostan Spg. &
   Wvg. Mills Ltd. & Ors.

3. Rastriya Mill Mazdoor Sangh.

4. Commissioner of Labour.

5. State of Maharashtra. ... Respondents.

WITH
APPEAL NO. 458 OF 2005
IN
WRIT PETITION NO. 1160 OF 2004

M/s.The Hindoostan Spg.&
Wvg.Mills Ltd., Mumbai. ... Appellant.

Vs.

1. Hindustan Crown Mills
   Siddhivinayak Kamgar
   Karmachari Sangharsha
   Sanghatana.

2. Hindustan Mills Process
   House Siddhivinayak Kamgar
   Sangharsha Sanghatana.

3. Rastriya Mill Mazdoor Sangh.

4. The Industrial Tribunal,
   Maharashtra, Mumbai. ... Respondents.

R.A.Dada, senior counsel with F.Divetre, senior counsel, S.K. Talsania and B.Dubash i/b.

Federal & Rashmikant for the appellant (in Appeal Nos.364/05 and 458/05) and for respondent No.1 (in Appeal No.441/05).

Mr.N.M.Ganguli with K.R.Chaudhary for respondent Nos.1 & 2 (in Appeal Nos.364/05 and 458/05) and for appellant Nos.1 & 2 (in Appeal No.441/05).

Ms.Hutoxi Tavadia with Anurag Gokhale i/b. Mahesh Thorat for respondent No.3 (in Appeal Nos. 364/05 and 458/05) and for respondent No.2 (in Appeal No.441/05).

R.J.Mane, A.G.P. for respondent Nos.4 and 5(in Appeal Nos.364/05) for respondent No.3 & 4 (in Appeal No.441/05) and for respondent No.4 (in Appeal No.458/05).

CORAM : DR.S.RADHAKRISHNAN AND V.C.DAGA, JJ.

DATED : 11th June 2007.

JUDGMENT : (Per Vijay Daga, J.)

1. These appeals are directed against the common judgment and order dated 21st February, 2004 passed by the learned single Judge in Writ Petition Nos.1097/2004; 1160/2004 and 1702/2004, out of which two are filed by M/s.Hindustan Spinning & Weaving Mills Ltd. (“Company / appellant-Mill” for short) and another one by Hindustan Crown Mills

Siddhi Vinayak Kamgar Karmachari Sangharsha Sanghatana and others (“Union” for short). In all these petitions Rastriya Mill Mazdoor Sangh (“RMMS” for short) was joined as party respondent. By the impugned order, the award of the Industrial Tribunal dated 21st February, 2004 granting and/or confirming the grant of permission to close down two undertakings of the appellant- Mill came to be set aside with direction to grant compensation, in lieu of reinstatement, to the workmen, who did not opt for voluntary retirement until 1st March, 2004 with other reliefs referred to in the operative part of the judgment and order together with gratuity in accordance with the provisions of the Payment of Gratuity Act.

Factual Matrix :

2. The factual matrix, not in dispute, taken from the impugned judgment are as under:

3. The appellant- Mill is a business house of some antiquity belonging to the Thackersey family. The business activities were initially commenced in 1805 as a trader and were then expanded to cover the manufacture of cotton fabrics. The Mill was incorporated in 1882 or thereabouts as a Limited Company. The Crown Spinning and Manufacturing Company Ltd., which had also been incorporated in 1880, was amalgamated with the appellant- Mill with effect from 1st April 1975 by an order passed by

this Court on 23rd July 1976 in the exercise of its Company jurisdiction. After amalgamation, the Mill had four manufacturing Units in Mumbai, two units – Units 'A' and 'B' – at Jacob Circle, Mahalaxmi, the Processing House Division at Prabhadevi and the Crown Mills Division at Dadar. There was a general strike in the cotton textile Industry in the City of Mumbai in 1982 which substantially eroded the position of the industry. The appellant- Mill overcame the adverse effects of the textile strike by 1989 and between the years 1989-90 until 1997-98, a dividend of 20% was generally speaking declared by the Company. In addition to the issuance of bonus shares, the shareholders have received a dividend of Rs.1054 lakh. In 1989-90, the Mill altered the object clause in its Memorandum of Association so as to include *inter alia*, the carrying on of Real Estate business. Sometime in the year 1995-96, the Mill set up a textile unit at Karad. In March 2002, the Mill is stated to have closed down two units at Mahalaxmi. Since the workers, it is alleged, were persuaded to accept voluntary retirement, no permission of the State Government under Section 25-O was sought for the closure of the two units at Mahalaxmi. The Company, it is alleged, stopped giving work to the workers in the Crown Mills and Process House Divisions and wages were paid irregularly after October 2002. According to the management, the net worth of the Mill was eroded on 31st March 2001 and the Mill became a sick industrial undertaking under

the Sick Industrial Companies (Special Provision) Act, 1985. The BIFR registered the Mill's reference on 29th August 2001. On 4th December 2002, the BIFR declared the Mill as a sick industrial undertaking and directed the operating agency to formulate a scheme for the rehabilitation of the Mill.

4. On 29th December 2002, Voluntary Retirement Scheme (VRS) agreements were entered into by the Mill with Rashtriya Mill Mazdoor Sangh (RMMS) – the recognised Union - in respect of Crown Mills and the Process House Division. The VRS agreements, *inter alia;* brought within their coverage, employees who had not completed 60 years of age as on the date of the submission of the application for voluntary retirement and who were on the muster rolls of the Mill. Clause 2 of the agreement lays down the compensation that was payable and clause 3, the schedule of payment. The Company agreed to issue post-dated cheques but clause 3(g) laid down that in the event that the Company was unable to raise funds as visualized therein, due to unavoidable circumstances, after relieving the employees, the Company in consultation with RMMS would inform both RMMS and the employees individually, not to deposit the cheques in their Bank Accounts. In such cases, the employees would be paid interest at a rate 1% higher than what is payable by nationalized Banks for fixed deposits, on the delayed part of payment. The employees, it

was provided, will not take recourse to any legal proceedings. Clause 4(k) of VRS Agreement is material for the present purposes, for it provided that employees who will not opt for voluntary retirement, would be redeployed by the Company, if necessary, by re-organizing and restructuring manufacturing activities in any of the Industrial Units of the Company. Clause 4(k), *inter alia,* provided as follows :

> "The remaining employees who will not opt for voluntary retirement under the Scheme will be redeployed and assigned work in any section, department or units of the Company without adversely affecting their service conditions. The employees and RMMS shall fully co-operate with the Company in the implementation of the Scheme and re-organizing and restructuring of its manufacturing activities in any of the Units, as per the requirement of the Company. The employees shall accept the work assigned to them and attend to it in the normal and peaceful manner and give the expected production every working day as per decision of the Company. Wherever required the employees will be given necessary training by the Company. After implementing the VRS the reorganization will be done in consultation with the RMMS."

The Company, it was recorded, would be at liberty to dispose of <u>excess or redundant</u> plant and machinery <u>including land and building</u> for the purpose of raising funds for implementation of the

VRS and for reorganizing and rationalizing its manufacturing activities in a more economic and viable manner. Immediately after the VRS agreements came to be signed, the Company by its letter dated 30th December 2002 furnished a schedule of payment to RMMS. The schedule of payment provided that the payment on account of VRS, Ex-gratia, Encashment of Leave, Bonus for 2002 and Leave Travel Allowance would be paid in 25 installments initially between February and December 2003 when an installment of Rs.5,000/- per month would be paid. Thereafter, between January 2004 and June 2004, an installment of Rs.10,000/- per month would be paid, while the balance would be paid in equal installments between August 2004 and March 2005. In the event that the Company was unable to raise funds, it was stipulated, then in consultation with RMMS, the employees would be individually informed in which event they would be entitled to a higher rate of interest as provided in the agreement.

5. The VRS agreements, as noted earlier, specifically provided that those employees who would not opt for voluntary retirement, would be redeployed and assigned work in any Section, Department or Unit of the Company. The employees agreed to co-operate in the re-organization and restructuring of manufacturing activities. On 30th December 2002 at a meeting of the Board of Directors, the Chairman of the Board, informed the

Board of the agreements for voluntary retirement and stated that he was hopeful that all the workmen would opt for VRS "thus enabling the land development in Mumbai units as envisaged under the Draft Rehabilitation Scheme submitted to IDBI, the operating agency recently." The Chairman stated that in the event that all the workmen at the Crown Mills Unit and the Process House Division did not opt for VRS, it would not be possible to properly reorganize or restructure the working of any unit in Mumbai with the small group of workers who may not opt for VRS and it would be impossible to run such operations except at heavy cash losses. Therefore, opined the Chairman, "the Company would have no alternative but to exercise an option of closure of all units in Mumbai i.e. "A/B" Units at Mahalaxmi, "C" Unit at Dadar and Process House at Prabhadevi." The Board thereupon passed a resolution authorising the making of an application for closure of the Mumbai Units under the Industrial Disputes Act, 1947.

6. On 10th April 2003, the Company moved applications under Section 25-O of the Industrial Disputes Act, 1947 each in respect of the Crown Mills and the Process House Units before the Commissioner of Labour, Mumbai, which were treated as one application dated 2nd May, 2003 by consent of parties. The annexure annexed thereto gave full particulars and details of the first appellant and the process house and Crown Division Unit as per

requirement of law. These particulars included, *inter alia*;

> Annual production for the preceding 3 years.
>
> Production figures, month-wise, for the preceding twelve months.
>
> Work-in-Progress, item-wise and value-wise.
>
> Position of the Order book, item-wise and value-wise.
>
> Financial position of the appellant.
>
> The losses incurred by the Crown and Process House Units for the last three years.
>
> Percentage of wages of workmen to the total cost of production.
>
> Administrative, general and selling costs.
>
> Inventory position, item-wise and value-wise.
>
> Annual sales figures for the last 3 years.
>
> Reasons for proposed closure.
>
> Attempts made by the appellant to avoid closure.

7. The respondent- Union, on 1st May 2003, filed their replies to the above applications made

by the appellant to the Commissioner of Labour for closure of two subject units. Similarly, respondent No.3, RMMS also filed its reply to support the said applications.

8. The Commissioner of Labour vide its order dated 30th June, 2003 granted permission under section 25(O)(2) of the I.D.Act for closure of two subject units for the details reasons recorded therein.

9. The respondent- Union, on 2nd July, 2003, filed two applications for review under section 25 (O)(5) of the I.D.Act against the order dated 30th June, 2003. similarly, the appellant also filed two applications on 4th July, 2003 for review, *inter alia*; contending that the Commissioner of Labour had exceeded its jurisdiction by putting certain onerous conditions while granting permission for closure of subject units.

10. The Commissioner of Labour by order dated 15th July, 2003, inter alia; referred matters to the Industrial Tribunal under section 25(O)(5) of the I.D.Act.

11. The appellant- Mill filed its statement of claim wherein it stated that it was one of the oldest textile Companies in the country that had established a reputation in the domestic and export market. The operations of the Company were

stated to be profitable and satisfactory until 1995-96. The profitability is stated to have deteriorated from 1996-97 due to several factors beyond the control of the Company such as high labour costs, high cost of utilities such as power and water in Mumbai, unfair competition from small scale/power loom sectors and 'various Government Policies' favouring the de-centralised sector. The Company sustained net losses of Rs.9.40 crore in 1997-98 which increased to Rs.46.60 crore in 2000-01 and as of 30th September 2002, the cumulative losses were stated to be Rs.185 crore. The Company, it was stated, had to make a reference to the BIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 since as of 31st March 2001 its net worth stood eroded. The BIFR had declared the Company as a Sick Industrial Undertaking on 4th December 2002. In support of its proposal to close down the undertakings, the Company claimed that many composite mills at Mumbai including the appellant- Mill had become sick and had closed down or were proposing closure due to the following reasons:

(a) Government policies: The Company claimed that the decentralized sector has been a recipient of several concessions and exemptions in fiscal, trade and labour policies. The excise duty structure and quota policy were alleged to be biased towards the small scale and decentralized sectors;

(b) Attempts to rectify anomalies in Government policies were alleged not to have borne fruit. As a result, the share of fabric production of the composite mill sector was reduced to less than 4% in 2001.

(c) Fiscal policies of the State Government and the Municipal Corporation were alleged to be against the interest of the textile industry in Mumbai and municipal charges for water, a major input for textile production, were stated to be highest in the world;

(d) Unfair competition from the unorganized sector which has enjoyed concessions and also resorted to evasive practices;

(e) High labour cost, low level of productivity and high input cost in Mumbai Mills;

(f) Constraints to modernization on account of resources;

(g) Over capacities in the global market– affecting the margins for exports;

(h) Increased debt burden due to interest liabilities and funding of cash losses.

12. The Company contended that it had attempted to avoid closure during the previous two or three years by discussing and trying out various alternatives in the product-mix and marketing/

supply chain. The Company, it was stated, attempted financial restructuring with the help of financial institutions and in order to reduce the interest burden but this could not result in improving the position. The promoters were stated to have brought in funds to improve liquidity and some funds were raised by development of property in Mumbai. According to the Company, the Bombay Textile Research Association had carried out a techno-economic feasibility study and had recommended closing down of all operations of textile units in Mumbai. Finally, it was stated that following the VRS agreement dated 29th December 2002, 347 employees at the Crown Mills Unit and 242 employees at the Process House Unit had not opted for voluntary retirement and since the majority of the employees had opted for VRS, it was impossible to continue operations except at heavy cash losses. The Company claimed that with this small group of employees, it was not possible to properly reorganize or restructure the working of the unit and run the same viably.

13. The respondent- Union filed their written statement to the statement of claim made by the appellant- Mill to oppose prayer for grant of permission under section 25(O)(2) of the I.D.Act. The details of which are given in the later part of this judgment.

14. Evidence was adduced before the Industrial Tribunal both on the part of the management as well as on behalf of the Union. By its Award dated 21st February 2004, the Industrial Tribunal came to the conclusion that the Company had established a case for closure under Section 25-O. The Industrial Tribunal, directed that the closure compensation shall be paid within a period of 30 days and that workmen would be granted the closure compensation or payment due under the VRS agreement dated 29th December 2002, whichever was more beneficial. The Industrial Tribunal also directed that VRS payments due to employees, who were still to be paid, should similarly be discharged and paid within a period of 30 days.

15. Not satisfied with the aforesaid award of the Industrial Tribunal, both appellant- Mill as well as Union filed writ petitions in this Court referred to in the opening part of the judgment. The learned single Judge, vide his judgment and order dated 21st February, 2005, was pleased to set aside the award of the Industrial Tribunal and the petitions came to be disposed of in terms of para-43 of the said judgment.

16. Being aggrieved by the aforesaid judgment and order of the learned single Judge, the appellant- Mill filed two appeals being Appeal Nos.364/2005 and 458/2005 setting up various legal and factual challenges dealt with hereinafter,

whereas respondent- Union also filed an appeal bearing No.441/2005 to claim higher financial reliefs.

Rival Submissions :

17. Mr.Rafiq Dada, learned senior counsel, appearing for the appellant-Mill, submitted that the learned single Judge applied the wrong test in coming to the conclusion that the closure of the two Mumbai Unit was not justified and went on to misread the judgment of the Hon'ble Supreme Court in the case of ***Orissa Textiles*** (2002) 2 SCC 578. He further submits that the Apex Court in the case of ***Orissa Textiles*** has upheld the constitutional validity of the amended section 25-O of the Industrial Disputes Act, 1947 ("I.D.Act" for short) and further held that section 25-O lays down reasonable restrictions on the right to close down a business. He further submits that the learned single Judge did not read para-18 of the ***Orissa Textiles*** judgment in its proper perspective. According to him, para-18 of the said judgment lays down test of impossibility to justify closure. According to him, the passage extracted by the learned single Judge, if read in the context of the immediately preceding passage of the ***Orissa Textiles*** judgment, then one has to conclude that ***Orissa Textiles*** does not lay down "the impossibility test" for the purpose of section 25-O

(1) of the I.D.Act but the said observations were made in the context of closure due to exceptional circumstances contemplated in section 25-O(7) of the I.D.Act.

18. Alternatively, it is urged that even if the test of impossibility was held to be correctly applied in the facts of the present case, considering the reasoning given by the learned single Judge that test has been satisfied. In order to buttress this submission, Mr.Dada relied upon paras-39, 40 and 41 of the impugned judgment; wherein the learned single Judge has recorded that there has been a closure in fact, and that what remains was a shell of a textile mill.

19. Mr.Dada also relied upon the observations of the learned single Judge; wherein he has noted that the sanctioned scheme of the BIFR (upheld by AAIFR) contemplates that the land of the Mill at Mumbai would be sold to three Special Purpose Vehicles (“SPVs” for short) and the funds that would be generated, would be applied towards repayment of the dues of the secured lenders, banks and financial institutions, dues of workers and other statutory authorities. He further submits that the sanctioned scheme is, in fact, in the process of being implemented; three SPVs have been incorporated; and the lands of the two units in Mumbai have, in fact, been transferred to the SPVs. He further submitted that in this context, the

learned single Judge has noted that it is impossible to visualize a situation where the manufacturing operations in the Mumbai Mill can commence since the plant and machinery have all been sold.

20. Mr.Dada also tried to encash the finding recorded by the learned single Judge in the impugned judgment; wherein he has recorded that AAIFR has proceeded on the basis that the unviability of the two Mumbai units was established and that a sanctioned scheme for rehabilitation exits, which is based on the closure of the two Mumbai units. It is, in this context, that the learned single Judge has noted that restarting operations of the Mumbai units have been rendered impossible s a result of the sale of the plant and machinery. Having regard to the above findings, Mr.Dada submitted that on learned Judge's own findings, the test of “impossibility” stands satisfied.

21. Mr.Dada further urged that the learned single Judge has taken cognizance of the fact that the sanctioned scheme exists. The scheme sanctioned by the B.I.F.R. And upheld by AAIFR records the total losses of the Company, its liabilities to secured creditors and workers and finds that the existing debt burden of Rs.202 crore (i.e. Term loan and working capital only) was beyond the sustainable capacity of manufacturing

operations of the appellant- Mill and that the operations of the Mill at Mumbai had become inviable. He, thus, reiterates that the test of "financial impossibility" was satisfied in the facts of the present case.

22. Mr.Dada further submits that under section 25-O(1), once adequate and sufficient reasons have been made out justifying closure, permission for closure should ordinarily follow unless there is overriding public interest or some other relevant factor which requires permission to be refused. In his submission, in the instant case, there was no such overriding public interest or any other relevant factor pointed out. As such, he submits that the impugned judgment not only suffers from the error apparent on face of record but also suffers from the contradictory findings on the issue of "test of impossibility".

23. Mr.Dada urged that the impugned judgment records that this was a case of no evidence. While taking us to the voluminous evidence on record including oral evidence and cross-examination of the Vice-President of the appellant- Mill Mr.Madhav Ghaisas, he urged that it is impossible to conclude that it is a case of no evidence. In his submission, the grounds leading to closure disclosed in the applications and reiterated in the statement of claim filed before the Industrial Tribunal were admitted by the respondent- Union and

upon acceptance of existence of such grounds tried to plead and make out that the Mill management was responsible for creating such irreversible situation, which, according to him, Union failed to establish and discharge burden which was voluntary taken upon itself by the Union.

24. Mr.Dada submits that the applications for closure filed by the appellant- Mill were in prescribed form; wherein following facts were set out.

> (i) Annual production for the preceding 3 years; (ii) Production figures, month-wise, for the preceding twelve months; (iii) Work-in-progress, item-wise and value-wise; (iv) Position of the Order book, item-wise and value-wise; (v) Financial position of the Appellant; (vi) The losses incurred by the Crown and Process House Units for the last three years; (vii) Percentage of wages of workmen to the total cost of production; (viii) Administrative, general and selling costs; (ix) Inventory position, item-wise and value-wise; (x) Annual Sales figures for the last 3 years; (xi) Reasons for proposed closure; and (xii) Attempts made by the Appellant to avoid closure.

25. Mr.Dada further submits that in support of each of the fact the appellant- Mill led oral evidence of Mr.Ghaisas, Vice-President of the Mill. Mr.Dada took us through the evidence of Mr.Ghaisas in support of his submissions.

26. Mr.Dada while proceeding with his submission also urged that the learned single Judge had no jurisdiction or power to award any VRS compensation to the workmen who had not opted for VRS. In his submission, the quantum awarded is abnormally high.

27. Mr.Dada also relied upon the subsequent decision of the Division Bench of this Court in Writ Petition No.462/2005 filed by the respondent-Union challenging the decision of the AAIFR; wherein the contentions of the Union were that the scheme as framed permitting the closure of the undertakings in Mumbai were only viable undertakings in as much as B.I.F.R. And AAIFR have not considered those aspects have been turned down. Mr.Dada also relied upon the findings recorded therein that B.I.F.R. Rightly declared appellant-Mill (respondent No.1 therein) as sick company within the meaning of the Sick Industrial Companies Act, 1985. He further urged that the said order of the Division Bench also records that the member of the Union (petitioner therein) themselves have secured the financial benefits under the said scheme. Based on these findings, he urged that the

respondent- Union is estopped from challenging that the appellant- mill is not a sick company and that the said order would also operate as *res judicata* so far as the finding of sickness of the Mill is concerned, since the said judgment and order is accepted by the Union and has become final and conclusive between the parties to that petition. Mr.Dada, thus, prayed for setting aside the impugned judgment and order of the learned single Judge and sought restoration of the order of the Industrial Tribunal.

28. Ms. Hutoxi Tavadia appearing with Mr.Anurag Gokhale, learned counsel for the supporting union i.e. Rashtriya Mill Mazdoor Sangh tried to adopt the submissions made by Mr.Dada and in addition thereto urged that the Union acted in a bona fide manner and in interest of its members. They took us through the material available on record to persuade us that the observations made in the impugned order were unwarranted.

29. Mr.N.M.Ganguli, learned counsel appearing for the respondent- Union submits that the applications for closure were made in absence of any authorisation from the appellant- Mill as such they were not backed by any authority of law. According to him, under section 293(1)(a) of the Companies Act, the Board of Directors have no authority to decide to close down the undertakings. Permission of the shareholders and the Company was

necessary. It was not obtained. According to him, the President of the Company, who signed the applications for closure, or any other executive or director of the Company is not permitted in law to make such applications.

30. In the submission of Mr.Ganguli the applications made were vague and did not furnish particulars and proof of statements made therein. According to him, even before the Tribunal no evidence was produced by the Company in support of the statements made in the applications. According to him the Industrial Tribunal misunderstood section 25-O(2) & (5) of the I.D.Act. That the Mill- management could not prove any of the allegations made in the applications including the comparative cost of production of the appellant-Mill vis-a-vis other mills in organized and unorganized sectors in Mumbai and elsewhere. That the appellant- Mill could not establish the unviability of the units proposed to be closed.

31. In the submission of Mr.Ganguli, the documents submitted cannot be accepted as evidence by mere production thereof. They were required to be proved, subject to cross-examination. In his submission, Mr.Ghaisas, who was examined, was not the author of the documents which were referred to by him in his evidence. According to Mr.Ganguli, Mr.Tidke's evidence by no means support the case of the management for closure.

32. Mr.Ganguli submits that the appellant- Mill did not produce BTRA report before any of the Court or Tribunal. According to him, the closure of Mumbai units of the Mill was a calculated attempt to commercially exploit the real estate. That the gradual reduction in the production of the Mumbai units was intentional, deliberate and calculated.

33. Mr.Ganguli submits that the applications for closure did not contain genuine and bona fide reasons. According to him, having regard to the over all situation, the reasons for the closure given could not be said to be adequate.

34. Mr.Ganguli further submits that the witnesses examined on behalf of the workmen have stated on oath that the existing number of employees after the VRS were sufficient to run the Mill, which was not controverted by the management. He submits that the closure of the Mill has rendered 600 employees unemployed as such closure was not in the public interest. That the Mill units are more than 100 years old which alone should discourage their closure.

35. Mr.Ganguli submits that the learned single Judge was fully justified in holding that the closure was illegal. That, once the closure is held to be illegal, the consequence laid down under section 25-O(6) of the I.D.Act must follow. The

workmen are entitled to all the benefits under the law as if the undertaking has not been closed down. In his submission, right to work is an integral part of Article 21 of the Constitution of India and condition of contract of employment. He submits that the management should restart the Mill by bringing back the machinery and employing suitable persons including the workers affected by the closure and pay to them wages and other benefits under the law of contract of employment.

36. Mr.Ganguli further submits that the compensation provided under section 25-O(8) is not adequate to offset the rigor of unemployment. The workers are not capable of securing alternate employment. If the closure is illegal then the employees are entitled to full wages till their retirement under the contract of employment as if there was no closure in terms of section 25-O(6) of the I.D.Act.

37. Mr.Ganguli submits that the only alternative left is to adopt the formula laid down by the Apex Court in the case of ***O.P.Bhandari*** though it is not intended for blue coloured workers having regard to the current rate of interest and other factors as such the minimum compensation required to be paid to the workers could be 150 months' wages so that on investment of the balance amount, after providing for income-tax and debt obligations, the worker might get amount equivalent

to 50% of the wages by way of return on the investments. That the worker should get the wages up to the date of the order. In his submission, the liability on this account is capable of being met by the Mill with soaring prices of the real estate.

38. Mr.Ganguli submits that there will be no question of any discrimination between the workers affected by closure and the workers who had opted for VRS under the agreement dated 29th December, 2002, since they have opted for VRS with their eyes open knowing fully well the consequences of the agreement and receipt paltry sums thereunder. He submits that the said workers have not only received the VRS amount but also interest thereon on account of delayed payment and Rs.25,000/- additional by way of ex-gratia payment (Bakshis). He, thus, submits that the appeals filed by the Mill deserve to be dismissed, whereas appeal filed by the Union deserves to be allowed with costs.

Contours of Writ Jurisdiction :

39. Before proceeding to consider the aforesaid issues in light of the rival contentions, it would be profitable and relevant to consider the contours of writ jurisdiction. Writ of Certiorari with which we are essentially concerned is an extraordinary common law remedy of ancient origin.

It is not a writ of right but one of discretion. The object of the writ is to curb excess of jurisdiction, to keep the inferior Courts and tribunals within their bounds. Its purpose is to bring for review before a superior Court the proceedings and judgments of inferior courts and tribunals clothed with authority to act judicially, when no appeal or other adequate remedy is available. This writ is not meant to take place of appeal. But Court may exercise all necessary appellate powers to do substantial justice.

40. Ground on which certiorari jurisdiction may be invoked,as already stated, is an error of law apparent on the face of the record and not every error either of law or fact which can be corrected by the appellate or revisional authority. It is essential that the error should be something more than the error; it must be one which manifest on the face of the record. It lies where the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of law which it was meant to administer.

41. Mere formal or technical error even though of law will not be sufficient to attract this extraordinary writ jurisdiction. Where the errors cannot be said to be errors of law apparent on the face of the record, but they are merely errors in appreciation of documentary evidence, or errors in

drawing inferences or omission to draw inference or in other words, errors which a court sitting as a Court of appeal only, could have examined, but such errors could not be corrected by Certiorari.

42. This is based on based the principle that a Court which has jurisdiction over a subject matter, has jurisdiction to decide wrong as well as right and when the Legislature does not choose to confer a right of appeal against that decision it would be defeating its purpose and policy, if a superior court were to rehear the case on the evidence and substitute its own findings in `Certiorari' (see ***T.C.Basappa v. T. Nagappa***, AIR 1954 Sc 440).

43. The Court does not substitute its own decision nor does it direct the body whose decision is quashed as to the decision it is to come to on reconsidering the matter. But of course, it will reach its decision in the light of the court's ruling so that if a decision is quashed for a procedural error, the correct procedure as indicated by the Court must be followed where the matter is to be considered afresh.

44. The aforesaid principles are well-settled and well recognised in catena of cases viz; ***Parry & Co. v. Commercial Employees Association***, AIR 1952 SC 179, ***Veerappa Pillai v. Raman and Raman Ltd.***, AIR 1952 SC 192, ***Ebrahim Aboobakar v. Custodian General of Evacuee Property***, AIR 1952 SC 319, ***Hari***

Vishnu Kamath v. Ahmed Ishaque, AIR 1955 SC 233, A.I.R. 1958 SC 398, A.I.R. 1958 SC 845 and ***Custodian, E.P. v. Abdul Shukoor***, AIR 1961 SC 1087 consistently followed in all subsequent judgments of the Supreme Court till date.

45. In short, Judicial review is directed not against the decision, but is confined to the examination of the decision making process. When the issue raised in judicial review is whether a decision is vitiated by taking into account irrelevant, or neglecting to take into account of relevant factors or is so manifestly unreasonable that no reasonable authority entrusted with the power in question could reasonably have made such decision. The judicial services of the decision making process includes examination, as a matter of law, of the relevance of the factors as held by the Supreme Court in the case of ***State of U.P. vs. Maharani Rajlaxmi Kumari Devi***, A.I.R. 1989 S.C. 1010.

46. The grounds on which the interference by the High Court is available in such writ petitions have already been sketched by us in the paras appearing hereinbefore. In ***Dharangadhara Chemical Works Ltd. v. State of Saurashtra,*** AIR 1957 SC 264. The Apex Court observed that where the Tribunal having jurisdiction to decide a question comes to a finding of fact, such a finding is not open to question under Article 226 unless it could

be shown to be wholly unwarranted by the evidence. Likewise, in ***State of Andhra Pradesh v. S.Sree Ram Rao***, AIR 1963 SC 1723, the Supreme Court observed that where the Tribunal has disabled itself from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or where its conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person can ever have arrived at that conclusion interference under Article 226 would be justified.

ISSUE :

47. On the rival contentions of the parties, the issue for determination is:

> "Whether the learned single Judge was within the aforesaid well recognised limits when he set aside the award?"

CONSIDERATION :

48. Since this is an appeal arising from a writ petition for certiorari we also would not interfere with the conclusion arrived at by the Tribunal except on the ground on which the learned single Judge could have done. Mr.Ganguli's contention, which found favour with learned single Judge, was that the findings of the tribunal were beyond its jurisdiction, that they were unwarranted by

evidence on record and were based either on wrong assumptions or mere conjectures without any foundation in the evidence and, therefore, this was a fit case for interference.

49. Having heard rival parties, having examined contours of writ jurisdiction under Article 226 of the Constitution of India, let us consider whether the decision of the Industrial Tribunal in question was vitiated by taking into account irrelevant or neglecting to take into account relevant factors or was so manifestly unreasonable that no reasonable authority entrusted with the power in question could reasonably have made such a decision, warranting interference in the writ jurisdiction of this Court.

50. Before, however, we proceed to examine above aspect of the case, we may first consider the scope of the Tribunal's jurisdiction in case of closure arising under section 25-O(2) & (5) of the I.D.Act. The requirement of section 25-O(2) is in the nature of a restriction imposed upon the right of the employer to close down the business. The present section 25-O of the I.D.Act is denuded of the infirmities found in its predecessor. The provisions of section 25-O of the I.D.Act, as it now stand require the Government to give reasons for its order; the factors to be considered by the appropriate government are stated in section 25-O (2); an objective approach in arriving at the

decision by the Government, is now imperative; the factors stated in section 25-O(2) which are to be considered are to be understood in the light of the decision in ***Excelwear*** (supra); the appropriate Government has to strive to strike a balance between the various interest involved, in the background of a particular situation; any unreasonable order can be corrected by judicial review; the Government itself may review its order or refer the matter for decision by a Tribunal for adjudication; the application of the employer has to be considered by the appropriate Government and the order to be communicated within sixty days from the date on which the application is made, failing which the permission is deemed to have been granted; there is always an assumption that the Government would exercise its power reasonably. In Excelwear, the Supreme Court recognised that a law may provide to deter reckless, unjust, unfair or mala fide closures; therefore, requirement of a prior permission for closure; by itself cannot be an unreasonable restriction on the fundamental right of the employer to close down his business. Therefore, this phrase must be so construed as to make the restriction which is imposed on the right of the employer reasonable within the meaning of Article 19(6) because the right to close down is not an absolute right and it can certainly be restricted, regulated or controlled by the law in the interest of the general public. The question whether the reasons given by the employer are

genuine and adequate will, no doubt, depend upon the facts of each case. The right to close down a business being an integral part of the fundamental right to carry on business, the words “genuine and adequate” must have that meaning which is consistent with the nature of the right. If the closure is bona fide or on account of unavoidable circumstances, beyond the control of the employer, then they will have to be regarded as genuine and adequate.

51. In order to answer the question raised for consideration, one has to first turn to the rival pleadings; oral as well as documentary evidence followed by impact of the order of the B.I.F.R. and its confirmation in appeal by A.A.I.F.R. Followed by subsequent events taking place during the pendency of the appeal including confirmation of the orders of B.I.F.R. and A.A.I.F.R. by this Court in exercise of writ jurisdiction under Article 226 of the Constitution of India.

52. At this stage, we must make it clear that by no means we propose to appreciate or reappreciate the evidence on record. Our endeavour is only to find out whether or not it is a case of `no evidence' in support of prayer for closure; since the learned single Judge has set aside the order of the Industrial Tribunal on this count alone.

RIVAL PLEADINGS :-

53. Statement of claim filed by the appellant-mill is dated 8th September, 2003. Besides preliminary objection to the tenability of the reference (which appellant did not press at this stage), the appellant-Mill has stated that the Company had filed two separate applications under Form XXIV-C under Section 25(0-1) of the Industrial Disputes Act, both dated 10-4-2003; subsequently treated as having been made on 2nd May, 2003; seeking permission to close two subject undertakings of the Company, namely; (1) Crown Mill at Gokhale Road (South) Prabhadevi, Mumbai and (2) Process House at Yadav Patil Lane, Veer Savarkar Marg, Prabhadevi, Mumbai. The Commissioner of Labour by common order dated 30th June, 2003 was pleased to grant permission for closure of the said two units for the reasons recorded therein.

54. The appellant- Mill while placing reliance on the contents of the aforesaid two applications produced some additional documents and pleaded that when the applications for permission in the prescribed form were made the financial position was showing loss of Rs.185 crore; which was further deteriorated resulting in further carry forward losses in the sum Rs.237 crore for the quarter ending 30th June, 2003.

55. It was also pleaded that none of the two

units could work economically. Both units were in the non-working condition on the date of filing of the statement of the claim. An anxiety was expressed in the pleadings by the appellant-Mill that in the event permission to close down the aforementioned two units was not granted; the Company would be required to face liquidation proceedings. That is how, the permission granted by the Commissioner of Labour dated 30-6-2003 was sought to be supported and prayer to maintain the order granting permission to closure was made before the Industrial Tribunal through statement of claim filed by the appellant- Mill.

56. The contesting respondent Nos. 1 and 2 (respondent- Union) filed written statement giving rosy and glorious historical background of the Crown Mill and Process House together with the capital structure of the Appellant-Mill showing bright side of the said Units till 1997-98. At this stage, it is relevant to mention the peculiar feature of the written statement which virtually admits the case of the appellant- Mill leading to adverse circumstances affecting the viability of the units and profitability of the business but holds the Mill-Management responsible for the same, which can be seen from the narration appearing hereinafter.

57. The respondent- union has alleged unfair

labour practices on the part of the appellant-Mill. It went on to allege that the appellant-Mill did ensure proper maintenance of machinery and regular supply of spare parts up to 1st April, 1998. But from 1st April, 1998 onwards the management stopped purchases of spare parts, particularly; spares and accessories necessary for the quality production. It is further alleged that the Mill- Management started mixing cotton and polyester in the raw material with the result the quality of end product suffered. The workers were forced to work on the machineries supplying substandard quality of the raw material. The deteriorating quality of cloth had its immediate impact in the export market. The inferior quality of final product is admitted but blame for the same was thrown on the Mill-Management. It is also admitted that from 1st April, 1999 onwards, the export started dwindling drastically. That in the local market, due to unfair trade practices, company suffered heavy set back in realization of their dues. Again, the case of the appellant- Mill that their product suffered in the domestic as well as international markets was admitted by the Union but the appellant- Mill was sought to be held responsible for the same.

58. It is further alleged by the respondent-union in defence that on many occasions the aforesaid lapses on the part of the Mill-management were brought to their notice but in

reality management never took any steps to ensure proper supply of spare parts and proper mixing of cotton and polyester since promoters were adverse to accept any suggestions of the respondent- union.

59. The similar allegations are to be found in the written statement with respect of Crown Mill; that the quality of the finished cloth was not maintained by the Mill. The orders placed with the Mill were abruptly cancelled by the parties for want of quality product. In export trade, the goods supplied by the Company were rejected by the foreign buyers as they were not satisfied with the quality of the product. The appellant, ultimately, lost heavily in the export market during the period 1st April, 1999 to December, 1999. The earning in foreign exchange on account of export of goods for the period April to December, 1999 started showing reverse trend. This fall in export earning was falsely covered up by the Directors of the Mill in their annual report by attributing adverse trading conditions; which, in fact, was due to deteriorating quality of the products. Here again the case of the appellant or the reasons given by them leading to adverse circumstances was admitted by the respondent- Union but attempt was made to hold the appellant responsible for creating such adverse situation.

60. It was further sought to be pleaded in the

defence that Karad Unit was a white elephant of the company. The Karad unit was wholly responsible for the cause of heavy losses suffered by the appellant- Mill. It was further alleged that the management of the company followed dubious business methods to seek personal gains. According to the respondent- Union, substantial part of cloth used to be sold at substantially reduced rates to M/s. Ruby Mills Ltd and M/s.K.Dinesh and other companies wherein the members of the Thackersey family were either directors or associated with. Liberty was sought to prove these facts during the course of trial. It is, thus, clear that the heavy losses suffered by the appellant- Mill were admitted but reasons for such losses were attributed to the over all mismanagement on the part of the Mill-Management.

61. It was further alleged that the unbridled borrowings; without any restrain whatsoever; had given rise to a situation that, as on 30th September, 2002 the loan borrowed by the Mill was to the tune of Rs.17,091.52 lacs with heavy interest burden of Rs.3,793.87 lacs for the period of 15 months ending 30th September, 2002. According to the Union, the debt trap faced by the Company was its own creation. The borrowings made were not properly utilized by the Mill-Management. It was further alleged that design of the Mill-Management was to exploit the immovable properties so as to claim wind fall profit out of the land development.

As per Union, the entire attempt of the Mill-Management was to close down the Mill. The adverse social impact leading to closure of the Mill was sought to be high lighted. It was alleged that in the year 1991-92 the debt equity ratio was 0.71:1; which rose to 1.98:1 in the year 1996-97. That the huge unproductive and unwanted loans taken by the Board of Directors since the year 1992-93 damaged the financial health of the appellant- Mill. The Company's net worth was adversely affected. Here again the huge loan liability incurred by the appellant- Mill resulting in heavy interest burden was admitted blaming the appellant- Mill for indulging in such reckless borrowings.

62. It was further alleged in the written statement that in the month of March, 2002 with the active support and co-operation of the recognised union, namely; R.M.M.S., the company managed to obtain resignations of 1,528 employees working in Unit-B. The operation in Unit-B was carried on up to October, 2002 with the help of the workers who had already resigned but agreed to work on payment of 70% of the normal wages paid on cash basis. It was thus, admitted that VRS was floated and majority of the workers opted for the same. The stoppage of production of Unit-B was also admitted by the Union in its written statement.

63. It was further alleged that various

Departments and/or Sections were closed in the Crown Mill and Process House from June, 2001 and payment of monthly wages to staff and workers were deliberately delayed by the Mill. In the written statement reference to B.I.F.R. was admitted but it was sought to be contended that the applications for closure was based on vague and general allegations without any supporting cogent evidence.

64. So far as the recognized Union, namely; R.M.M.S., is concerned they completely supported the applications moved by the appellant- Mill (Management) for closure of these two units doubting their viability and urged that the closure was the only alternative. The same would be in the interest of the workers.

RIVAL EVIDENCE :

65. With the aforesaid rival pleadings on record, the parties were permitted to lead oral as well as documentary evidence. However, before proceeding to examine the rival evidence, looking to the nature of defence taken, it is necessary to examine legal position based on law of evidence with regard to the number of admissions given and burden of proof incurred by the Union.

66. An `admission' is a statement of fact which waives or dispenses with the production of evidence by conceding that the fact asserted by the opponent

is true. The Supreme Court has observed:

> Admissions as defined under section 17 and 20 and fulfilling requirement of section 21 are substantive evidence. The admission is a best evidence against the party making it though not conclusive, shifts the onus to the maker on principle that what the party himself admits to be true may be reasonably presumed to be true so that until onus is discharged the facts admitted must be taken to be true. (see Mohd.Koya v/s. 1979 (1) SCR 664).

67. The statements in pleadings are admissions against the party making them. In ***Union of India v/s. Moksh Builders etc.***, AIR 1977 SC 409, the Supreme Court cited a statement from its own earlier decision to the effect that an admission is substantive evidence of the fact admitted and when properly proved is relevant irrespective of the fact whether the maker approved it in the witness box or not and when he appears; whether he was confronted with those statements or not in case he made a statement contrary to his admission. Admission so far as facts are concerned binds the maker of the admission. Admission may be oral or contained in documents, e.g. Letters, depositions, affidavits, plaints, written statements, deeds, receipts etc. Admissions in pleadings are judicial admissions. They can be made foundation of rights. Admission in the written statement filed in some other case have been held by the Supreme Court to be an important piece of evidence and, therefore,

entitle to its due weight though like all other admissions, it is neither conclusive nor irrefutable. (see ***Shankar v/s. Vithalrao***, AIR 1989 Sc 879). In the case on hand, admissions are given in the written statement filed in the very case.

68. Now, let us examine the concept of burden of proof. Under section 101 of the evidence Act, whoever desires any Court to give judgment as to any legal right or liability dependent on existence of facts, which he asserts, must prove that those facts exist. When person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. In other words, the burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. The party on whom onus of proof lies must, in order to succeed, establish a *prima facie* case. He cannot, on failure to do so, take advantage of the weakness of his adversary's case.

69. With the above settled legal position of law, now let us examine whether any attempt was made by the respondent- Union to prove their stand or defence taken by them in the written statement. The burden of proof was on the respondent- Union since their case was that the heavy losses were incurred by the Mill because of substandard quality of finished product and that the adverse market

conditions were the direct result of the mis-deeds of the appellant- Mill (Management) themselves. The burden to prove these facts was incurred by the respondent- Union because of their pleadings in the written statement wherein they admitted the case of the appellant but tried to hold the appellant- Mill responsible for creating that situation. It was, thus, obligatory on the part of the Union to prove their assertion either by leading direct evidence in this behalf or through cross-examination of the witnesses produced by the appellant- Mill.

70. Before examining the strength of the evidence of the appellant- Mill, considering the peculiar stand taken in the written statement by the Union, it is necessary to first read the evidence led by them.

71. The Union has examined one Mr. Arvind Narayan Kambli (UW-1), Executive President of the said Union with some other witnesses.

72. Mr.Kambli has deposed on oath and alleged that the Management did not bring any evidence on record to prove that Crown Mill was not financially sound. He deposed that the reasons for seeking grant of permission to close down two subject units were false and dishonest in nature. He further

deposed that permission for closure would result in destroying the life of the workers as such it would not be in the interest of the society to grant permission for closure. He further went on to allege that B.I.F.R. and IDBI had prepared rehabilitation scheme at the dictate of the Directors of the appellant- Mill and went on to depose that if Mill is allowed to be closed down its subject units, then the workers will be thrown on the street. This is what Mr.Kambli has stated in his examination-in-chief.

73. Mr.Kambli during his cross-examination he was asked by the appellant- Mill as to from where the figures given in para-8 of the written statement were taken. To that he answered expressing his inability to reply. He was further cross-examined with regard to the adverse allegations made by the Union in their written Statement leading to the financial mismanagement holding appellant- Mill responsible for the same. To that he replied,

> “presently, I cannot say from where those figures have been taken”.

He was further cross-examined with regard to the attempt of the Union to dispute the figures of the

Balance-sheet produced by the appellant- Mill to which he replied,

> “I cannot say about the figures, profit from the Balance-sheet of 1996-97, so also Balance-sheet of 1997-98, I cannot read the balance-sheet and the figures mentioned in it i.e. The Balance-sheets of the years 1989-90 and 1998-99.”

He further deposed as under:

> “ I do not possess any documentary evidence to show that second hand machinery installed in Karad plant. I do not possess any documentary evidence about the unrealistic planning referred in my W.S. I cannot specify from which unit which machinery has been repurchased. He do not possess any evidence regarding the exorbitant price, referred in the written statement. I do not possess any evidence of major financial misappropriation made by the company. No evidence offered by me in respects of contents of para 12 of written statement. (“Note para 12 or allegations are made in respect of reduction of cloth and certain method of .. profit”)

He further deposed in paras-32 and 33 of his evidence reading as under:

> “I say that if permission for closure of mill is granted then full life of 398 workers of Crown Mill shall destroy and such devastation of life of workers shall not be deplorable in interest of society.”
> “ I say that for consideration of BIFR board IDBI society has prepared the rehabilitation Scheme with advise of

Company Directors and the said scheme known as DRS. The Union denied the digits and figures shown in the said scheme are true and correct. As on 30th September, 2002 Company is to give following mentioned liabilities:-

(1) Term Loan of 109 Crore 35 lacs
(2) Loan for running Capital 92 crores 83 lacs
(3) Liability of Financial Society and Bank 202 crores 18 lacs.
(4) Light water and property tax & ors 4 Cr. 97 lacs
(5) All workers voluntary retirement: 111 cr 82 lacs
(6) Other liability- 37 crores 24 lacs and fixed deposits of 8 crore 40 lacs totaling 364 crores 61 lacs.

He further deposed that:

"I cannot say from where the figures of page No.11 para- 8 of my WS are taken, i.e., WS at Exh.U/5. It is correct to say that whatever figures regarding the financial aspects mentioned by me in the WS, presently I cannot say, from where those figures have been taken."

....

"I do not posses any documentary evidence to show that second hand machinery installed in the Karad Plant. I do not possess any documentary evidence about the unrealistic planning, referred in WS. .... I do not possess any evidence regarding the exorbitant price, referred in the WS. I do not possess any evidence of major financial misappropriation made by the company. No evidence offered by me in respect of the contents of para-12 of WS.

74. Another witness examined by the respondent-Union was one Mr.Bhagwan Sakharam Shinde (UW 2), who deposed as under:

> "I say that if the mill close the workers will completely destroy and this is not appropriate in interest of society as whole. Similarly, the reasons given for closing mill by the management are dishonest, selfish and false in nature."
>
> "I say that by taking into consideration all above mentioned facts and circumstances, Hon'ble Industrial Tribunal dismissed the application of Management and from 2nd July 2003 they are on work and declared their services have not been terminated like this be declared and order be given to Management to give wages from 1st of July, 2003 order also be passed to continue the service of workers till they attend the age of 63 years".
>
> "I say that under the scheme of voluntary retirement the non resigned workers and employees are expecting justice from Tribunal and it is requested to give natural justice and release from danger from forthcoming unemployment to the workers. Such type of request is being done by Workers and Union."

Mr.Shinde in his cross-examination stated as under:

> "I cannot understand from the balance sheet regarding the content of para-10 of my affidavit. However I say so as per the advise given to me."
>
> ....

> “Personally I do not know about the valuation of the assets of the company. We have not filed any evidence before this Tribunal regarding the financial soundness of the process house. I have not personally checked the application moved by the company for permission of closure.”
>
> ....
>
> “I have not checked all the contents of the application of closure, and about its correctness.”
>
> ....
>
> “I cannot say anything about the balance sheet figures.”
>
> ....
>
> “I do not possess any evidence to show that purchasing of spare parts stopped for the Process House from the year 1990 onwards. Rs.100 Crores expenses for karad Unit mentioned by me on the basis of the balancesheet. I cannot locate that figure in the balance. I do not possess any documentary evidence to show that second hand machinery brought from the various companies in the first party at the exorbitant price. I do not know the meaning of `depreciation'. The figures of the financial mis-appropriation on page no.17 para-11 of my W.S. Of Exh.U/5 mentioned on the basis of the balancesheet. I cannot locate those figures from the balancesheet.”

75. The above two witnesses were the star witnesses of the respondent Union. They did not prove case pleaded by the Union in its written statement wherein serious allegations of financial

mismanagement, playing with quality of end product, non-replacement of machineries or spare parts; huge borrowings resulting in debt trap were made. There was no whisper in the evidence of these two witnesses in this behalf.

76. Besides aforementioned two witnesses respondent-Union also examined Mr Victor Ignatius Dias (UW 3), Mr Ramdas Shantaram Borkar (UW 4) Mr Anant Vasudeo Ardekar (UW 5), Mr Varkey V. Thombas (UW 6) and Mr Santosh Anant Dandekar (UW 7). None of these witnesses examined by the Union made out any case or proved any of the facts pleaded by the Union to defeat the application made by the appellant Mill. Evidence of other witnesses is nothing but more or less repetition of the earlier two witnesses referred hereinabove. It is, thus, not necessary to refer to their oral evidence in detail.

77. Reading of the above evidence unequivocally show that the Union did not discharge burden of proof incurred by it. Since it failed to prove its assertion made against the management of the appellant-Mill, the admissions given in the written statement shall very much; bind the respondent-Union. In the wake of failure to discharge burden of proof it is futile to say that the appellant-Mill failed to prove its case. Admission is a best evidence which binds the party giving it.

78. Now let us turn to the evidence adduced by the appellant-Mill-Management. They examined one Mr.Dinesh Tidke, who was working as President of the Mill and one Mr.Madhav Padmakar Ghaisas, Senior Vice President (Finance).

79. Mr. Dinesh Tidke deposed in support of the application (M.P.B.) and deposed that on account of deteriorating financial position and considering the various factors it was considered impossible to continue working of the two units economically as such the Board of Directors has to take a decision to close down these two units since there was no alternative.

80. He further deposed that when the applications for permission were made the financial position as given in the application was showing loss of Rs.185 crore which was further deteriorated resulting in further carry forward losses of Rs.237 crores for the period ending 30.6.2003. He further stated that in the application; various reasons given were the causes for the losses incurred by the Company, which had adversely affected the working of the two units resulting in heavy losses. He further deposed that the reasons given in the applications were true and correct. That the attempts were made to overcome the financial crisis but the Mill-Management found it difficult to overcome the adverse situation. All attempts made proved futile. He deposed that the detailed facts

given in the applications were true and correct. That the B.I.F.R. has declared the company as sick company on 4.12.2002.

81. Mr Tidke deposed in support of detailed reasons given in two applications dated 10.4.2003, and stated on oath that it had become impossible for the company to run two units i.e. Crown Mills and Process House. The manufacturing process in the said two units, due to financial crisis, was required to be discontinued.

82. Mr Tidke further stated that being a President he had taken all the measures such as reduction in expenses, introduction of new products together with various other corrective measures. He also deposed that in the cost reduction methods, reduction in energy consumption; reduction in damages; reduction in wages etc. were some of the measures which were taken by him including rationalization of employees. But all these measures proved futile. Ultimately, the Company was required to go before the B.I.F.R., wherein it was declared as sick unit on 4.12.2002.

83. In cross-examination, questions were put to Mr.Tidke in such a manner that the case which was not proved by the Mill-Management through its witnesses was proved by the Union itself. It was brought on record through cross-examination that the Company was declared as sick unit on 4.12.2002

by B.I.F.R That the huge accumulated stock of fabrics was lying in the Mill in absence of purchase orders which was one of the causes which forced the appellant-Mill to apply for closure of the two Units under Section 25-O of the I.D.Act.

84. Mr Tidke denied all the adverse suggestions given to him in his cross-examination by the Union. However, case sought to be made out in the written statement by the Union making allegations against the appellant- Mill was never put to Mr. Tidke when he was under cross-examination. The law in this behalf is clear. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in the cross-examination, it must follow that he believed that the testimony could not be disputed at all. It is wrong to think that this is essentially a technical rule of evidence. It is rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice because it gives notice to the other side of actual case that is going to be made out when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do while cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness has any share. If he asks no

question with regard to this, then he must be taken to have accepted the opponents case in its entirety. (see ***A.E.G. Carapiet v/s. A.Y.Derderian***, AIR 1961 Cal 539; ***Sarwansing v/s. State of Punjab***, 2003 (1) SCC 240).

85. It was also expected rather necessary on the part of the respondent- Union to extensively cross-examine Mr.Tidke and to challenge each and every statement made by him on oath to demonstrate its falsify and to confront him with their defence. But the respondent- Union miserably failed to challenge Mr.Tidke's evidence. It could not succeed in demolishing the case of the appellant- Mill. It could not establish its defence. Even no suggestions of their defence were given to Mr.Tidke. With the result, the evidence of Mr. Tidke practically went unchallenged. As a matter of fact, in the cross-examination, adverse material is brought on record by the Union which advanced the case of the appellant- Mill rather than that of the respondent- Union.

86. With the aforementioned evidence on record, one has to give due weightage to the evidence of Mr.Madhav Ghaisas (CW 2), who deposed in support of the audited Balance-Sheet and Profit and Loss Accounts for the accounting periods ranging from April 1999 to December, 1999; January, 2000 to March, 2001; and April, 2001 to September, 2002. He has deposed that the contents thereof were true

and correct. He has produced Balance-sheet, Profit and Loss Account with the Directors Report adopted and passed in the Annual General Meeting of the shareholders for the respective years. He has also deposed on oath that the information about financial position of the Company given in the Annexure to the applications; more particularly, at items 11 and 12 of the Annexure as well as the details given thereunder (as required under the prescribed form) were true and correct. He has also deposed that the information at items 13, 14, 15 and 16 to 21(a) and (b) to the Annexures was also true and correct and that the reasons given for the closure under Item 22 and sub-items mentioned thereunder were are also true and correct. He further deposed that details under item 23 regarding attempts made to avoid closure were also true and correct.

87. Mr.Ghaisas reiterated in his evidence that the financial position of the Mill had been deteriorating as set out in the applications. The Company's net worth by December, 1999 was eroded to the extent of 50% and fully by March, 2001 as such Company was declared as a Sick Unit by B.I.F.R. vide its order dated 4.12.2002. That the company had no capacity to raise financial resources for modernization to revive the working of the units. He further deposed that Karad Unit alone could not serve and pay the huge outstanding loans exceeding Rs.200 crore borrowed from the secured lenders from

time to time. He further deposed that the adverse situation could not have been allowed to continue since it was neither in the interest of workers nor the financial institutions. That is how he deposed in support of prayer for permission to close down two subject units.

88. Mr.Ghaisas was cross-examined by the respondent- Union on the contents of the Balance-sheets and Auditor's report and the statements made thereunder. This trend of cross-examination, ultimately, resulted in proving those documents. The law in this behalf is well settled. In the case of ***Ram Janki Devi v. Juggilal Kalamapat***, AIR 1971 SC 2551 (para-15), the contention that in absence of scribe, the account books were not proved - was held unacceptable. One of the reasons was that the account books were shown to the witness in the cross-examination and questions were asked on the same. The Supreme Court treated those account books as proved. Similar is the situation in case at hand vis-a-vis balance sheets, profit and loss accounts, and other financial statements are concerned. Each of them were shown and used in the cross-examination by the Union. It is, thus, not open to the respondent- Union to complain lack of proof of those documents. All those documents were rightly read by the Industrial Tribunal in evidence.

89. The case sought to be made out in the

written statement which throws entire blame on the Mill-Management for creating adverse situation was never put to these witnesses, when they were under cross-examination as already stated hereinabove.

90. The legal position is well settled. A person who says house is benami must satisfy the Court of this fact. Where a person claims right of way, he must prove that he acquired that right and it is not for the other side to show that he does not have such right. The respondent- Union alleged and desired to prove mismanagement, reckless borrowings, substandard production affecting the health of the Mill with deliberate intention to exploit real estate of the Mill but could not prove the same by cogent evidence. The burden of proof to prove these facts was on the Union, who desired the Court believe existence of such facts. The Supreme Court in the case of ***Kalwa Devaderttam v. Union of India***, AIR 1964 SC 880, held that where no evidence is led on the question in dispute by the party on whom burden lies to prove certain facts then it must fail. Failure to discharge burden in this behalf left the substantive evidence in the form of unexplained and unrebutted admissions in the field binding on the maker of the admission, viz.; the respondent-Union. The appellant on this count alone was entitled to succeed.

91. Thus, looking to the evidence of these two

witnesses on the well established legal principles; it is not possible for us to conclude that the appellant- Mill did not produce evidence to prove their case for closure of the subject units. The findings recorded by the learned single Judge in this behalf are liable to be set aside.

AWARD AND FINDINGS:

92. If the entire evidence available on record is considered in its proper perspective, the appellant- Mill has made out its case for closure of the subject units.

93. With the aforesaid pleadings and evidence on record, the Industrial Court in reference, inter-alia; confirmed the permission for closure granted by the Commissioner of Labour by its order dated 30th June, 2003. The Award was passed by the Tribunal taking into account the evidence of the parties with which no fault can be found. The Tribunal found that-

> (i) The appellant had innovated the VRS scheme and was ready to utilize the assets for paying the liabilities of the workers and other institutions and that this was a genuine reason for grant of permission.
> (ii) The figures which were given in the statement of Accounts and the

Balance Sheets of the Appellant were figures from public documents and the figures were proved by the of the Appellant through the evidence of Mr Ghaisas;

(iii) Respondent- Union could not substantiate its allegations that the figures of losses are bogus.

(iv) Respondent- Union could not suggest a concrete plan to profitably run the subject Units.

(v) The appellant had borrowed money from financial institutions and all these financial institutions wanted to recover money. The public money of the financial institutions was required to be saved;

(vi) It was the duty of the Tribunal to consider the plus and minus factors while granting or refusing the permission. The reasons given, in totality favoured grant of permission.

(vii) The figures of profit and losses given in the chart and the Balance Sheets and the Annual Statements of the appellant were required to be appreciated, it being the figures of the account maintained in the due course of business and there being nothing on record to disbelieve the same, as such the same could not be ignored;

(viii) Having given an opportunity of hearing to the appellant, the workmen and the persons interested, the genuineness and adequacy of the reasons of the closure could not be doubted;

(ix) Respondent- Union could not offer any evidence pertaining to the profits gained by both the units;

(x) The evidence of respondent- Union could not contradict the reasons offered by the Appellant for closure of the Units;

(xi) Respondent- Union failed to prove that the closure was a pretense to determine their services and to fetch more profits from the real estate business;

(xii) Respondent- Union was relying upon the figures of the profits and loss account right from 1990 onwards and, therefore, it would not be proper to accept the submission of the Respondent-Union that these figures were not giving the position of both the Units.

(xiii) The figures of the balance sheet and the annual statement were required to be accepted in its entirety;

(xiv) The production of the three accounting years prior to the date of the closure applications i.e. April 1999, December 1999, 2000-2001 and 2001-

02 given by the Appellant showed that the production of both the units had gone down every month;

(xv) To continue with the manufacturing activities was not possible in the given situation;

(xvi) There was nothing wrong with the fact that the balance sheets of both the Units were not prepared separately, since a common balance sheet was prepared by the Appellant as per practice prevailing past several years;

(xvii) The analysis of the Balance sheet showed that both the Units were running into losses;

(xviii) The primary intention was to meet the liabilities and not to fetch the profits from the sale of the lands;

(xix) The shortage of working capital for Karad Unit could be met if the closure application was allowed;

(xx) Both the Units were at “no return situation” and Respondent- Union could not establish on the record that both the Units were running profitably.

(xxi) The figures of the proposed assets and liabilities clearly showed that nothing would be left out after meeting the liabilities of the workmen;

(xxii) The public interest was not likely to suffer due to closure of the

said Units;

(xxiii) The appellant had given reasons and information in the prescribed form along with documentary evidence in support of closure.

(xxiv) The oral evidence of the Respondent- Union showed that the witnesses produced by it did not know anything directly and that they had failed to make out a case that the closure was a camouflage and not bona fide;

(xxv) The Appellant had proved that continuing the manufacturing activities was not possible in the present situation;

(xxvi) Figures of profit and losses and the balance-sheet given by the Appellant could not be disbelieved and/or ignored.

94. Having examined the rival pleadings, rival evidence and findings recorded, it can not be said that the findings of the Tribunal in the award were based on “no evidence” as held by the learned Single Judge in the impugned order.

IMPACT OF B.I.F.R. PROCEEDINGS:

95. The Supreme Court in the case of ***Navnit R. Kamant*** **v.** ***R.R.Kamani,*** (1989)66 Com Cas 132 (AIR) 1989 SC 9) explicitly explained the object of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA)legislation in the following words:

> "The legislation had been enacted with the end in view to :
>
> 1. Afford Maximum protection of employment;
>
> 2. Optimise the use of the funds etc;
>
> 3. Salvaging the production assets;
>
> 4. Realising the amounts due to the banks, etc., and
>
> 5. To replace the existing time-consuming and inadequate machinery by efficient machinery for expeditious determination by the body of experts."

96. The Legislative intent of the Act is amply reiterated by the Supreme Court in SRF Limited V. Garware Plastics and Polyesters Ltd. (1995) 84 Comp Cas 201 (SC): (AIR 1995 SC 2228) as follows:

> "The legislative intent, which, therefore, becomes clear is that a sick or potentially sick industry should be detected timely. Proceedings for revival and rehabilitation of the sick or potentially sick company should expeditiously be completed within the time frame and if delay is unavoidable, it should be done within a reasonable time thereafter, say, six months. The

> proceedings are not to be allowed to be used as dilatory tactics to prevent rehabilitation of the sick company or potentially sick company, in particular by rival companies. The Board and Appellant Authority and the High Court should give effect to the provisions, comply with the procedural format, should finalise the proceedings expeditiously within the time frame so that not only the starving workmen who are kept in agonising wait for revival of the sick company without wages, be rescued, but also needless accumulation of losses by the Company and the loss of revenue to the State are avoided."

97. Where a reference is made by the industry under Section 15 of the SICA, the Board, viz. the BIFR is required to determine whether or not the industry has become a sick. The Board may require by order any Operating Agency to inquire into and make a report on the aspects as may be specified in the order. Section 16(3) further provides for that the Board or the Operating Agency, as the case may be, shall make the inquiry expeditiously and shall try to complete it within a period of 60 days from the commencement of the same. For the purpose of sub-section inquiry shall be deemed to have commenced upon receipt by the Board of the reference or information or upon its own knowledge reduced in writing by the Board. Under Section 17 if after making an inquiry under Section 16, the Board is satisfied that a company has become a sick industrial company, the Board shall, after

considering all the relevant facts and circumstances of the case, decide, as soon as may be, by order in writing, whether it is practicable for the company to make its net worth exceed the accumulated losses) within a reasonable time and pass appropriate orders. Under Section 14, the Board or the Appellate Authority shall be deemed to be a civil court for the purpose of Section 195 of Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974) and every proceeding before the Board or the Appellate Authority shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 and for the purposes of Section 196 of the Indian Penal Code (45 of 1860).

98. As a matter of fact, the High Court of Orissa in case of ***Noorjahan Begum v. O.S.L. Corpn. Ltd.*, 1999 II LLJ 527** had an occasion to examine provisions of Industrial Disputes Act, vis-a-vis SICA Legislation and record as under:-

> "Thus, the field of operation of Section 25-O of the Industrial Disputes Act cannot be said to be the same as that of Section 15 of the Act of 1985. As the two provisions of these two Acts do not operate in the same field, there is no question of any conflict or Section 15 of the Act of 1985 having overriding effect on Section 25-O of the Industrial Disputes Act."
>
> "...<u>There is no doubt that in case of any conflict in the field of operation of the Act of 1985,provisions of the</u>

Act of 1985 have the overriding effect.

(Emphasis supplied)

99. From perusal of the order of the B.I.F.R. It is clear that the appellant Company was declared as a sick company under B.I.F.R., vide order dated 1.4.2004; whereunder the Rehabilitation Scheme of the appellant-Mill was sanctioned.

100. The Scheme framed by B.I.F.R. has spelt out the following aspects:-

(i) The accumulated losses of the Appellant which were Rs.108 crore as on 31st March, 2001 increased to Rs.185 crore as on 30th September, 2002 and stood at Rs.237 crore as on 30th June, 2003;

(ii) That the debt burden of the Appellant towards Banks and Financial Institutions alone stood at about Rs.202 crore as on 30th September,2002;

(iii) That the workers dues and statutory dues as on 30th September, 2002 were to the tune of Rs.111.82 crore and Rs.4.97 crore respectively.

(iv) That unsecured loans/creditors as on 30th September, 2002 aggregated to Rs.45.64 crore.

101. The Board of Directors of the Appellant pursuant to the above Scheme approved the demerger and vesting of the assets and liabilities of A and B units in favour of Capricorn Realty Limited; whereas with respect to M/s. Crown Mills Unit "C" in favour of the M/s. Bhishma Realty Limited and of the Process House Unit "D" in favour of M/s.Chaitra Realty Limited; effect from 1st October 2002 in the manner and at the values stipulated in the Scheme framed by B.I.F.R.

102. The Appellant pursuant to the Scheme also approached the Monitoring Committee, constituted under Regulation 58 of the Development Control Regulations 1991 to monitor the development of land of cotton textile mills, for obtaining clearance for development of its land at Mahalaxmi on the basis of the proposed agreement with M/s. K. Raheja Corporation Pvt. Limited.

103. The Monitoring Committee has also granted permission to the Appellant-Mill to enter into the Joint Development Agreement with M/s.K.Raheja Corporation Pvt. Limited and issued directions for disbursements to be made from the advance payable in the sum of Rs.40 Crores on execution of the Joint Development Agreement. The Monitoring Committee has also allowed the Appellant to discharge following liabilities:-

(i) Dues of the workers of the Mahalaxmi Units ["A" and "B"] up to end

of August, 2004;

(ii) Dues of workers of Crown Mills Unit “C” and Process House Unit “D” who had opted for VRS, to the extent of Rs.5 crore; and

(iii) Charges of Municipal Corporation and other statutory charges, legal and professional charges etc. up to Rs.14 crore.

104. Three certificates were issued by M/s.Pandhi and Shah, Chartered Accountants, inter alia, certifying the authorized capital, paid-up capital, accumulated losses and value of the equity shares of the three Companies viz. M/s.Capricorn Realty Limited, M/s.Bhishma Realty Limited and M/s.Chaitra Realty Limited. Three separate Declaration-cum-Affidavits executed by the Appellant. In turn these three Companies have also confirmed the transfer and vesting of the assets and liabilities mentioned therein giving an undertaking to discharge all the obligations mentioned in the order of BIFR dated 1st April 2004 and the Scheme framed thereunder. These declaration-cum-affidavits were filed before the BIFR. That is how the B.I.F.R. Scheme was given effect to.

105. At the meeting of the Monitoring Committee the Respondent-Union specifically informed the Monitoring Committee that “these workers have no

objection for going on with the process of satisfying the dues of the workers who have taken VRS, from the sale proceeds that will be received from the development of the Mahalaxmi Unit".

106. At the second thought, in the meeting of the Monitoring Committee, the Respondent-Union while reversing their earlier stand, objected to the Monitoring Committee proceeding further with regard to the development of the Mahalaxmi property of the Appellant. This was despite the fact that none of the workers of the Mahalaxmi Unit of the Appellant are represented by the Respondent-Union.

107. The Monitoring Committee clarified that unless the Respondent-Union obtained an order from the Court/Authority, the Monitoring Committee could not accede to the request of the Respondent -Union. The Monitoring Committee, however, adjourned the matter to 18th August 2004 to enable the Respondent-Union to take further appropriate steps which Union failed to take.

108. The appellant-Mill has made the following payments from the advance received from the Developers:-

(i) Rs.19.24 crore to 1457 workers of the A and B Units of the Appellant.
(ii) Rs.4.18 crore to 1554 workers of the C and D Units of the Appellant.

(iii) Rs.1.14 crore towards closure compensation to the members of the Respondent Union.

(iv) Rs.73 lakh towards Provident Fund dues.

109. The order of the B.I.F.R. was a subject-matter of challenge in appeal before A.A.I.F.R. The AAIFR dismissed the Appeal filed by Respondent-Union In the said Order dated 23rd December, 2004, the AAIFR has, inter alia, observed :-

(i) That the sanctioned scheme dated 1st April, 2004 provided for financial restructuring and rationalization of work force with the object of reviving the viable manufacturing unit at Karad, which employed a very large number of workers;

(ii) That the non-viability of two Mumbai units located at Dadar and Prabhadevi had been established by the report of BITRA and recognized by the operating Agency and all the financial institutions and the fact of closure could not be revisited by the Authority.

(iii) That BIFR had correctly taken into consideration the closure of the two units in Mumbai, based on the orders of the Labour Commissioner which had also been upheld by the Industrial Tribunal and had proceeded to approve

the Rehabilitation Scheme formulated by the Operating Agency;

(iv) That the interest of workers had been fully protected in the sanctioned scheme;

(v) That the necessity for closing the units at Dadar and Prabhadevi had been examined and justified on grounds of public interest by the Labour Commissioner and upheld by the Industrial Tribunal, and the question of redeploying the 597 workmen in the two closed units at Dadar and Prabhadevi (Mumbai) did not arise;

(vi) The prayer of the respondent Nos. 1 and 2 to remand the matter to the BIFR for modifying the sanctioned Scheme to protect the interests of Respondent-Union would serve no useful purpose and would only result in delay in implementation of the scheme besides leading to cost escalation.

(vii) The sanctioned Scheme fully protected the interests of all the stake holders including the workers who had accepted VRS and who had not accepted VRS.

(viii) The sanctioned Scheme would help the revival of the viable unit at Karad through the process of rationalization of work force and financial

reconstruction and refurbishment of the tools and machinery;

(ix) The sanctioned Scheme had the full support of the operating Agency all the secured creditors as well as Respondent No.3.

SUBSEQUENT EVENT:

110. Writ Petition No.462 of 2005 filed by Respondent-Union before Division Bench of this Court challenging the Order of A.A.I.F.R. dated 23rd December, 2004 confirming the order dated 1st April, 2004 sanctioning the rehabilitation scheme by the BIFR, which came to be dismissed by an order dated 1st August, 2006; i.e., subsequent to the impugned judgment of the learned Single Judge; wherein learned Division Bench, inter-alia, noted that the steps taken by the Appellant pursuant to the said Rehabilitation Scheme, including the fact that the Appellant had made full payments to the workers of Units A & B and substantial amounts to the workers of units C and D including the member workers of Respondent-Union pursuant to the said Scheme. The payment of Rs.59.52 crore to the workmen was also taken note of together with the payment of Rs.5.29 crore towards closure compensation and wages to the members of Respondent-Union.

111. The fact that Appellant had acted on the

Agreement with M/s.K.Raheja Corporation and from amounts received therefrom paid the workers substantial amount was also noted by the Court.

112. Whilst dismissing the aforesaid writ petition, Division Bench held as under:-

> “Findings of fact had been recorded by B.I.F.R and those findings had been confirmed by A.A.I.F.R. to the extent that company is sick, which clock cannot be set back. Thereafter restructuring package has been approved based on that, third party rights have been created and Respondent No.1 till date, has received a sum of Rs.40 crore out of which a sum of Rs.29 crore have been paid as workers' dues. In so far as the contention raised under Section 18, in our opinion, is totally devoid of merit”.
>
> “ In so far as report is concerned, it was contended that it was not before B.I.F.R. We have perused the petition. There is no averment raised before us that the report of BTRA was not produced before B.I.F.R and B.I.F.R. considered the same without the same being available. Apart from that on behalf of Respondent No. 1 it is pointed out that so far BTRA report is concerned, all concerned including the Operating Agency and the various secured Lenders of the Respondent Company were founders of the same. As pointed out by us earlier, the recognized union has also not opposed the same. The members of the petitioner Union themselves have secured the financial benefits under the scheme. Hence, no case is made out for interference and consequently, petition stands dismissed.”

113. The above judgment of the learned Division Bench is accepted by the respondent-Union since no further challenge to the said Judgment and order was set up by them. This judgment is binding on the respondent-Union. The orders of B.I.F.R. and A.A.I.F.R have become final and conclusive and binding on the Union on the touch-stone of doctrine of res-judicata.

114. The orders of the authorities constituted under the S.I.C.A. having become final, it is not possible for any Court much less this Court to put the clock back and direct resumption of manufacturing activities. As a matter of fact, the learned Single Judge also found it difficult to issue any such direction contrary to the order of the B.I.F.R. and A.A.I.F.R. which is clear from the following observations made in the judgment and order:

> "39. The subsequent events have, in a sense, over take the course of events. It is common ground that some part of the machinery has been redeployed from the Crown Mills to the Karad Unit (reference may be made in this connection to the 122nd Annual Report of the Company for the year 2002-03). The rest of the machinery and equipment, the Court has been informed, has been sold. There is in the facts of this case, a closure in fact and what remains is a shell of what was a textile mill. The BIFR and the AAIFR which are duly constituted adjudicatory bodies under

> the Sick Industrial Companies' (Special Provisions) Act, 1985 have sanctioned the scheme for rehabilitation which contemplates that upon the grant of closure permission, the Mill land at Mumbai would be sold to three special purpose vehicles and the funds that would be generated would be applied towards the repayment of the dues of the secured lenders viz., Banks and financial institutions, the dues of the workers and other statutory dues."
>
> "40. At this stage and particularly in the light of the fact that the draft scheme for rehabilitation has been sanctioned, upon which the order of the BIFR was confirmed in appeal, it is impracticable if not impossible to visualise a situation where manufacturing operations in the Mumbai mills can commence particularly since the plant and machinery have been sold. Counsel for the Union submitted before the Court that the Union would challenge the order of the AAIFR in an appropriate proceeding. The correctness of the order passed by the AAIFR does not fall for determination in these proceedings in which what is in issue is the correctness of the order passed by the Industrial Tribunal on a reference under Section 25-O(6). The AAIFR proceeded on the basis that the unviability of the two Mumbai Units was established by the report of BTRA though as noticed earlier, in so far as the present proceeding goes, this report was neither produced nor proved in evidence before the Industrial Tribunal."

115. It is, thus, clear that restarting of the Mill- Units is now out of question. The findings recorded by B.I.F.R. have achieved finality and

Scheme has been substantially implemented. There is no possibility of revival at all of these two subject Units. The machineries are sold. The landed properties of the Mill are also transferred, may be partially, to other three developers as mentioned herein above. In view of this scenario, both orders i.e. order of B.I.F.R. and order of learned Single Judge refusing to permit closure has resulted in creating a conflicting situation. By no means, both orders can go hand in hand. Implementation of one order negates another. In view of this conflicting situation the order of B.I.F.R. will have the overriding effect. On this count also appellant is entitled to succeed, though the appellant has independently established their case for closure as found by us. By no means, it can be said that in the case in hand the appellant has not made out a case for closure of subject Units under Section 25-O of the I.D. Act. In view of this positive findings, it is not necessary to consider other submissions made by Mr.Dada leading to the interpretation of Section 25-O (7) of the I.D. Act.

116. In ***Dayakar Reddy v. M.D.Allwyn Auto Ltd.*, (2000) 9 SCC 247,** case (supra), the Apex Court observed that in a case where the Company is a State Government Undertaking, the State has to take an administrative decision first and then a quasi-judicial decision under Section 25-O. In paragraphs 2, 3 and 4 of the said report, the Apex Court

observed thus:

> “2. Allwyn Auto Ltd. was not a sick company taken to BIFR. The Company which had become sick was Hyderabad Allwyn Ltd. Under the Scheme framed by BIFR, the Auto Division of Allwyn was to be transferred to Allwyn Auto Ltd. To implement the Scheme Allwyn Auto Ltd. Was brought into existence in 1993. It was a State Government Undertaking. Under the Scheme a certain amount of fund was to be made available to this Company by the Government and the transferee-company namely, Voltas Ltd was to allow it to continue to occupy the premises available to it under a lease, for a period of 5 years from 1993. It was expected of Allwyn Auto that it will make some profit towards the end of five years and become a viable unit. However, the hopes turned out to be false because in spite of the Government pumping in about Rs. 13 crores, the Company went on incurring losses and the total loss by the year 1997 was about Rs. 12 crores. The lease was also expiring in 1998 and there was no possibility of getting it extended any further. The company and the Government found it difficult to get any other location where it could set up the unit afresh. It was under these circumstances, that the Company decided to close down its undertaking. Therefore, it cannot be said that the decision of the Company to close down was not bona fide.
>
> 3. After the proposal was received by the Government, discussions had taken place with the trade unions and the representatives of the workmen on many occasions. A Voluntary Retirement Scheme was also proposed. Two meetings took

> place before the Labour Commissioner. After taking into consideration the material which was available with it, the State Government took the decision that the Company deserved to be closed down.
>
> 4. It was contended by Mr. P.S. Mishra, learned Senior Counsel for the petitioner that in this case the State had suggested that the Company should be closed down and it was the same State which then decided under Section 25-O to grant permission for closure. In a case where the Company is a State Government Undertaking, such a situation may arise. It has to take an administrative decision under Section 25-O. What we find is that while exercising its power under Section 25-O it did follow the proper procedure and considered all the relevant aspects. It is not possible to find any fault with the decision of the State Government. The facts of this case are very eloquent. Moreover, by the time the Government took the decision, out of 1800 workers, 1200 workers had shown their willingness to accept the Voluntary Retirement Scheme. GO dated 16-6-1997 clearly discloses the reasons why the Company had become unviable and why it was not able to carry on its activities any further. The reasons appear to be genuine and adequate and, therefore, the Government was justified in granting permission for closure of the Company. This special leave petition is, therefore, dismissed."

117. In the present case also, the facts are eloquent. They are : (i) old and outdated building and machinery and very low productivity, (ii) continuous heavy losses, (iii) the subject units of the Mill are unviable, (iv) The accumulated losses

of the appellant- Mill which were Rs.108 crore as on 31st March, 2001 increased to Rs.185 crore as on 30th September, 2002 and stood at Rs.237 crore as on 30th June, 2003; (v) The debt burden towards banks and financial institutions alone stood at about Rs.202 crore as on 30th September, 2002; which was beyond sustainable capacity of manufacturing operations. (vi) The workers' dues with statutory dues as on 30th September, 2002 were to the tune of Rs.111.82 crore and Rs.4.97 crore respectively; (vii) The unsecured loans/ creditors as on 30th September, 2002 were aggregated to Rs.45.4 crore. (viii) The appellant- Mill's net worth as on 30th March, 2001 was fully eroded due to accumulated losses; (ix) The appellant- Mill has been declared a sick company as per the provisions as per the provisions of Sick Industrial Companies (Special Provisions) Act, 1985; (x) The textile operations in the units at Mumbai had become unviable; (xi) The Bombay Textile Research Association, a Government recognised textile research association, had carried out a detailed techno-economic study and evolved a suitable business plan for textile operations keeping in view the constraints on availability of resources and recommended shifting and concentration of operation at Karad; (xii) Out of total 2,206 workers of the subject Units, 1609 workers have accepted VRS, leaving behind 597 workers i.e. Members of the respondent- Union.

118. Needless to mention that in the case of

Rashtriya Sut Girni Mazdoor Sangh v. Govt. of Maharashtra, 2001 LAB.I.C. 2589, for more or less similar reasons, textile mill at Badnera in Vidarbha was allowed to be closed down by the Nagpur Bench of this Court by setting aside the order of the Labour Commissioner refusing to grant permission to close down that undertaking under section 25-O of the I.D.Act. As a matter of fact, the case on hand stands on a better footing for grant of permission for closure under section 25-O of the I.D.Act.

119. The Commissioner of Labour has also found the reasons assigned by the appellant- Mill as cogent, adequate and genuine. For all these reasons, it cannot be said that the decision of the appellant- Mill for closure of the subject units was not bona fide and genuine. No fault can be found either with the order of the Commissioner of Labour or the Industrial Tribunal granting permission for closure of the subject units under section 25-O of the I.D.Act. Since the subject units of the appellant- Mill were unviable and in the light of its huge liabilities which cannot be satisfied even if the subject units are made operative, though as on date that has become impossible in view of implementation of the scheme of reconstruction made by the B.I.F.R.

120. The submission of Mr.Ganguli that the application made by the appellant- Mill under

section 25-O of the I.D.Act seeking closure of the subject units is in violation of Article 14 and 19 (1)(g) of the Constitution of India cannot be accepted. There is also no merit in the submission of Mr.Ganguli that the mismanagement of the appellant-Mill by its Management is a cause for bringing bad days to the subject units. Not a single piece of evidence is available on record warranting this conclusion or that the appellant-Mill could have made better use of their resources when it wanted to. As held by the Supreme Court in the case of ***Andra Prabha v. Madras Union of Journalist***, AIR 1967 Sc 1869, we have got to judge things by what was done and not what could have been done. The Division Bench of the Gujarat High Court in the case of ***Associated Cement Company v. Union of India***, 1989 (1) LLJ 599 has observed as under:

> "Merely because the employer has not managed his undertaking properly, it cannot be made out a ground for refusing permission to close down his undertaking. Unless it is found as a matter of fact that the situation requiring closure has been brought about deliberately and *malafide, p*oor management or mismanagement of the undertaking can hardly be regarded as a good ground for refusal of permission to close down an undertaking."

121. Apart from the above, so far as public interest is concerned, one cannot overlook heavy

debts incurred by the appellant- Mill which made the company sick. The implementation of scheme resulting in closure of subject units will result in generating liquidity which can be used to satisfy debts of the Mill and dues of workers and residue can be used to pump money in the Karad Unit which, after expansion, is bound to generate more employment and give more production to contribute to the national wealth.

122. The implementation of B.I.F.R. Scheme will pull out the company from its sickness and make it a viable company. It is, no doubt, true that some of the workers, who were working in subject units at Mumbai, may face problem of unemployment; which they are already facing as on date; but at the same time Karad Unit on generation of more employment will provide more employment opportunities to the society at large. Sometimes, in order to make one limb safe and strong, other part of the body is required to be sacrificed. Therefore, while considering the question of public interest, little larger view is required to be taken into account so as to struck equitable balance between the two competing interests of the society. Considered from this angle, no fault can be found with the order of the Industrial Tribunal granting permission for closure of the subject units. The impugned order is, thus, liable to be set aside. In this view of the matter the petition filed by the respondent- Union cannot succeed.

RELIEFS :

123. Having said so, now, the question before us is to what reliefs the workers i.e. the members of the respondent- Union are entitled to. Needless to mention that they would only be entitled to statutory compensation as prescribed under section 25-O of the I.D.Act. However, in order to see that the workers who had not opted for VRS are not deprived of the benefits of VRS and certain other benefits which were extended by the appellant-Mill to the members of the recognized union i.e. R.M.M.S., we tried to persuade the Management of the appellant-Mill to offer benefits similar to the benefits offered by them to the workers/ members of R.M.M.S.; which were higher than the closure compensation prescribed under section 25-O of the I.D.Act. The management of the appellant- Mill after some hesitation by way of good gesture and to buy peace agreed to offer better deal without prejudice to their legal rights and filed two affidavits dated 9th April, 2007 and 11th April, 2007 setting out their offer and agreed to pay:

> (i) 36 days salary for each year of service based on last drawn salary as on 31st March, 2004, subtracting amount already paid by way of closure compensation;
> (ii) Gratuity, leave allowances and

other allowances;
(iii) Ex-gratia payment of Rs.30,000/- per worker;
(iv) Salary from 1st July, 2003 to 31st March, 2004 with interest on item Nos. (i) and (ii) (supra) at the reasonable rate from 1st July, 2003 till payment in full and final;

124. However, this offer is made subject to the conditions that the members of the respondent-Union, who would be agreeable to accept compensation in terms of the above must communicate their unconditional acceptance by registered A.D. letter within a period of 30 days from the date of pronouncement of this judgment and after receipt of such unconditional acceptance, the appellant- Mill shall make payment within 30 days thereafter. Failure on the part of the workers to exercise their option to accept the proposal given by the Mill- Management, their right to claim benefits as offered shall stand withdrawn and then they shall only be entitled to claim closure compensation (only) in terms of section 25-O of the I.D.Act. The affidavits filed and conditional proposal given in this behalf by the appellant- Mill is taken on record.

Hence the following order:

O R D E R

The impugned order dated 21st February, 2005 passed by the learned single Judge in Writ Petition Nos.1097/2004 and 1160/2004 is set aside and Appeal Nos.364/2005 and 458/2005 are allowed. Order of the Industrial Tribunal dated 21st February, 2004 is restored, subject to the condition that the appellant- Mill shall pay to the members of the respondent- Union or to the workers, who did not opt for VRS, by way of closure compensation (as offered by them) to be calculated in the following manner.

(i) 36 days salary for each year of service based on last drawn salary as on 31st March, 2004, subtracting amount already paid by way of closure compensation;

(ii) Gratuity, leave allowances and other allowances;

(iii) Ex-gratia payment of Rs.30,000/- per worker;

(iv) Salary from 1st July, 2003 to 31st March, 2004 with interest on item Nos. (i) and (ii) (supra) at the rate of 12% per annum from 1st July, 2003 till payment in full and final;

The payment of the above closure compensation as offered by the appellant- Mill shall be without prejudice to their rights; and to those workers only; who shall exercise their option to unconditionally accept it within 45 days from

the date of pronouncement of this judgment and order.

The appellant- Mill shall be liable to make payment of compensation to workers within 45 days from the date of receipt of their options failing which it shall carry interest thereon @ 12% per annum till repayment in full and final.

The respondent- Union shall communicate the operative part of this order to all its members in vernacular so as to enable them to exercise their option.

The appellant- Mill shall be liable to pay closure compensation in terms of section 25-O of the I.D.Act to those workers who would not exercise their option to accept the offer of the appellant- Mill.

Appeal No.441/2005 filed by the respondent-Union is dismissed.

In the circumstances, no order as to costs.

All the concerned to act on an authenticated copy of this judgment.

(V.C.DAGA, J.) **(DR.S.RADHAKRISHNAN)**